No. 14,708

United States Court of Appeals

For the Ninth Circuit

ALLSTATE INSURANCE COMPANY,
a Corporation,
Appellant,

vs.

OSCAR F. ERICKSON,
Appellee.

APPELLANT'S REPLY BRIEF.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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APPELLANT'S REPLY BRIEF.

1. THE GROUNDS OF THIS APPEAL DO NOT INVOLVE A CONFLICT OF EVIDENCE, BUT A LEGAL CONSTRUCTION ON THE EVIDENCE THAT SHOULD BE MADE ACCORDING TO WELL ESTABLISHED AUTHORITY.

Appellee's brief has recourse to the familiar principle that to the Court alone is committed the function of deciding questions of fact, and that an appellate tribunal will not interfere with a decision supported by substantial evidence.

In seeking to persuade this Court that an appeal merely presents a challenge as to the weight of the evidence, appellee has adopted a device of long standing. This effort to cloud the issue should be futile.

Appellee devotes a substantial portion of his brief under Subject I (pages 1-5, Appellee's Opening

Brief) to a discussion of the sufficiency of the evidence to support a finding by the trial Court and to a discussion of the burden of proof. It is submitted that this discussion is entirely irrelevant to the issue framed in the trial Court's judgment, as set out in the opinion (Tr. 16, 17):

> "The principal question thus raised is whether the receipt of a letter from an insurer stating that an existing policy 'is being cancelled' effective at a future date renders false a representation that 'no insurer has cancelled or refused any automobile insurance' made to another insurer after receipt of the letter but before the future effective cancellation date."

The Court resolved this question by stating (Tr. 18) that the answer of appellee to the question on the application, concerning cancellation, was not false and, therefore, there was no false representation. Thus, the Court concluded as a fact that the letter of State Farm Mutual Insurance Company (Plaintiff's Exhibit No. 2) did not constitute a present cancellation.

It is submitted that, as a matter of law, that this letter did constitute a present cancellation. Appellant has cited extensive and overwhelmingly persuasive authorities to that effect and appellee has cited absolutely no authorities to the contrary. The trial Court found (Tr. 16) the insurance policy was issued by the appellant in reliance on the statement that no cancellation had been made. Thus, the entire judgment admittedly is predicated upon the determination of whether or not the State Farm letter (Plaintiff's

Exhibit No. 2) constituted a present cancellation or not. The trial Court in deciding that it did not constitute a present cancellation thus made a further finding that no false representation occurred. It follows as the night the day that had the trial Court construed that letter as a present cancellation, that there would have been a false representation.

Therefore, there appears no conflict of evidence regarding the facts of this case, the conflict is purely a legal one insofar as the construction properly to be placed upon the State Farm Mutual letter (Plaintiff's Exhibit No. 2) determines whether or not a false representation was made, which would, as explained in Appellant's Opening Brief, permit the policy to be rendered void *ab initio.*

The authorities and statutes cited in Subject I of Appellee's Opening Brief, with the exception of the case of *Emery v. Pacific Employers Insurance Company,* 8 Cal. (2d) 663, require no comment since they do not affect the issue in this appeal.

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2. APPELLEE HAS FAILED TO PRESENT ANY CASES IN SUPPORT OF THE LEGAL CONSTRUCTION OF THE STATE FARM MUTUAL'S LETTER (PLAINTIFF'S EXHIBIT NO. 2) UPON WHICH THE TRIAL JUDGMENT STAND OR FALL.

Appellant in its opening brief took pains to present to this Court the unchallenged authority concerning the wealth of judicial interpretation of the terminology of a letter of cancellation couched in the terms of Plaintiff's Exhibit No. 2. Appellee has failed

to present any authority to the contrary. It is respectfully submitted that there is no authority against the cogent and common sense approval of such terms as in this letter to constitute a present cancellation.

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3. APPELLEE HAS OVERLOOKED THE PROVISIONS OF SECTION 1644 OF THE CIVIL CODE OF THE STATE OF CALIFORNIA, WHICH DIRECT:

> "Section 1644. Words to be Understood in Usual Sense. The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed."

and which this Court has heretofore approved.

See:

Massachusetts Mutual Life Insurance Company v. Pistolesi, 160 Fed. (2d) 668.

There is no question but that the appellee understood that he was being presently cancelled when he answered the application interrogation concerning previous cancellation, "no". Within a day, he presented himself at appellant's place of business to make his application for insurance. In view of this conduct, we again refer to the wisdom of the citation from *Knutzen v. Truck Insurance Exchange,* 90 Pac. (2d) 282 at page 285, 199 Wash. 1:

> "The essence of a notice when sufficient in form and content is its objective consequences upon

> the one who receives it, not the subjective attitude of one who gives it.''

Certainly, the conduct of the appellee demonstrated that the prime import of a present cancellation was known to him.

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4. THE APPLICATION OF ALLSTATE INSURANCE COMPANY v. MOLDENHAUER, 193 FED. (2d) 663, TO THE CASE AT ISSUE.

The *Moldenhauer* case has been discussed in our opening brief and the actual trial transcript presented. There is no question but that there are circuits of our Federal Courts which have and will differ in determinations of similar controversies. However, the letters involved in both instances afford no room, in view of the legal authorities in support of the Seventh Circuit Court of Appeals' decision, to disregard a precedent in an arbitrary fashion.

The conduct of citizens being guided by statutory and case law requires a proper observation of precedent.

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5. APPELLEE MISCONSTRUES THE HOLDING IN AMERICAN GLOVE COMPANY v. PENNSYLVANIA INSURANCE CO., 15 CAL. APP. 77.

This case holds that the letter itself constitutes a cancellation, regardless of the fact that coverage continues as it did in that instance for five days because of a policy requirement that five days' notice be given. The holding in the *American Glove* case is

diametrically opposed to that of the trial judge from whose decision this appeal has been taken. Had the *American Glove* case been decided by the same reasoning of the trial judge in the instant case, no cancellation would have occurred until after the fire of April 19, 1906. However, as we have pointed out by generous citation in our opening brief (pages 10-12), the Court held:

> "The policy required 'five days' notice of such cancellation,' and for this reason the form of expression was adopted that the policy 'will be canceled on our books on the 14th inst., five days from date.' Moreover, the insured was asked to return the policy with the earned premium on that date. The meaning of this was in substance that the insurance company, desiring then to cancel the policy and to terminate its risk, thereby gave the insured the five days' notice prescribed by the policy, at the expiration of which the cancellation would become effective.
>
> * * * * * * *
>
> Here five days' notice of cancellation was required by the policy, and that notice was given. The notice did not express a mere intention of the defendant to thereafter avail himself of the cancellation privilege, but a present resort to it, which would become effective at the expiration of the prescribed period of notice."

Appellee, therefore, fails to distinguish the fact that a cancellation is a present effective act, although the effective termination of coverage may be extended for a limited time after the clear, unequivocal declaration of cancellation. Authorities cited by appellee

concerning construction of the policy are not pertinent.

A careful examination of the authorities cited on page 9 of Appellee's Opening Brief fails to reflect any case that is not readily distinguishable from the problem at bar and it is submitted an examination of them by this Court will reflect the same conclusion.

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6. SECTION 333 OF THE INSURANCE CODE IS NOT APPLICABLE TO THIS CASE.

There was no evidence in this case that would excuse the false representation of appellee under any of the subdivisions of Section 333 of the Insurance Code. Appellant was unaware of the previous cancellation and it had no reason to distrust the applicant and did not waive, but expressly conditioned the application as a truthful relation of the facts upon which it relied in the issuance of its coverage.

There was certainly no exclusion from the representations of the past cancellation history of the applicant and lastly, misrepresentation was material for it was one upon which the issuance of a policy was determined.

7. APPELLANT CANNOT BE PRESUMED TO KNOW OF APPELLEE'S FALSE REPRESENTATION NOR DID IT WAIVE ITS RIGHT TO RELY UPON THE REPRESENTATIONS IN HIS APPLICATION.

Appellee has cited Sections 335, 336 of the Insurance Code in support of a contention that the appellant was presumed to know appellee was falsely representing. As the evidence will reflect (Defendant's Exhibit D) appellant procured all the necessary information relating to the vehicle involved and the names of those whom the appellee stated would operate it. It is bound to know these things under Section 335 and such might be the general usages of the trade set forth in that section. However, it is inconceivable that morally, ethically, or legally one who falsely represents could claim that because dishonest conduct on his part has been perpetrated, that a Court should condone it on the ground that one who deals with another must anticipate falsity and dishonesty!

The record will show through the testimony of the witness Wood (Tr. 145-148) that complete reliance was made upon the representation that appellee had not been cancelled and that contrary to the contention of appellee at page 13 of his opening brief, there was no reason to make inquiry concerning appellee's past insurance history.

Appellee cites a portion of the trial Court's opinion at page 13 of his brief. It is submitted that the observations of the trial Court would impose a burden upon it which, under the circumstances of this case, are not necessary. The trial Court in that opinion

comments that the reply was not made in bad faith or with intent to deceive. There is no evidence in the entire record of this case that would support the dictum that appellee acted not in bad faith. On the contrary, the act of appellee in applying to appellant immediately upon receipt of the cancellation letter indicates that he answered the application question in bad faith. The Court goes on to say that the appellee was not in error when he stated that his previous policy had not been cancelled and thus cloaks his activities in that regard with an aura of sanctity. As a matter of fact, bad faith or intent to deceive is not at all an issue in this case for it has been held in the case of *Mirich v. Underwriters of Lloyds, London,* 64 Cal. App. (2d) 522 that if the insurer was misled by statements, *it is immaterial whether the insured's omission to state the true facts was intentional or unintentional.* Appellee contends on pages 14 and 15 of his brief with citations of cases readily distinguishable from the problem at bar, that there is a kind of waiver or estoppel on the part of appellant because of "such careless writing of their policy and application forms and failure to investigate." In other words, appellee admits the right of the appellant to declare this policy void *ab initio,* but would excuse it because the appellee was successful in winning the confidence of the appellant by an untruthful reply to its question in the application.

CONCLUSION.

Honest dealing among parties is the foundation of our national, economic, and social well-being. Of the untold contractual relations daily assumed among our citizens, undoubtedly but a fraction are tainted by dishonesty or false conduct. As the trial Court comments, the appellant is a large corporation and deals with millions of persons in its ordinary affairs of business. Each policyholder is one with whom a contract is executed and it is the premium of each policyholder that constitutes a fund available to indemnify another. Appellant is no more nor any less entitled to rely on the honesty and representations of persons contracting with it than any other citizen in the conduct of his affairs. Such dealing is predicated upon honest and fair disclosures, clearly understood by those who make them, which form the meeting ground upon which can be resolved the decision whether to contract or not.

In this case, the evidence reflects the same customary and usual practice of appellant in dealing with a policy applicant. It was entitled to rely upon his representations. It is readily submitted that the reservation by appellee from an honest disclosure of his previous cancellation misled appellant into the issuance of a policy which it otherwise would not have considered for immediate binding, or subsequent issue of its policy.

The issue in this case as to whether or not the State Farm Mutual Letter (Plaintiff's Exhibit No. 2) constituted a present cancellation has been amply

demonstrated to be such by the conduct of the appellee himself following its receipt and as a matter of law by the copious citation of authorities heretofore set forth in appellant's opening brief.

This Court should reverse the judgment heretofore rendered and direct a judgment in favor of the appellant.

Dated, San Francisco, California,
August 17, 1955.

Respectfully submitted,
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